

1 KRISTEN T. CASTAÑOS (SB #198672)
kristen.castanos@stoel.com

2 WESLEY A. MILIBAND (SB #241283)
wes.miliband@stoel.com

3 ERIC R. SKANCHY (SB #303759)
eric.skanchy@stoel.com

4 STOEL RIVES LLP
5 500 Capitol Mall, Suite 1600
6 Sacramento, CA 95814
Telephone: 916.447.0700
Facsimile: 916.447.4781

7 Attorneys for Protestant
8 City of Sacramento

9 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 IN THE MATTER OF

11 CALIFORNIA DEPARTMENT OF WATER
12 RESOURCES AND UNITED STATES
13 BUREAU OF RECLAMATION FOR A
14 PETITION FOR CHANGE FOR
15 CALIFORNIA WATERFIX

CITY OF SACRAMENTO'S RESPONSE
TO CALIFORNIA DEPARTMENT OF
WATER RESOURCES' OBJECTIONS TO
EXHIBITS SUBMITTED IN SUPPORT
OF PROTESTANTS' CASES-IN-CHIEF
DATED DECEMBER 30, 2016

16 **I. INTRODUCTION**

17 Pursuant to the Hearing Team's ruling dated December 19, 2016, the City of Sacramento
18 ("Sacramento") hereby responds to objections submitted on December 30, 2016 by the
19 Department of Water Resources ("DWR") to Sacramento's exhibits City Sac- 17, 22, 23, 24, 33
20 and 34 ("DWR's December 30 Objections").

21 DWR's objections to the above-referenced exhibits are limited to lack of relevancy and
22 foundation.¹ The objections by DWR are without merit for the reasons set forth below and as
23 otherwise provided for in the record of this proceeding. Accordingly, Sacramento respectfully
24 requests that DWR's objections be overruled.

25
26
27 ¹ DWR December 30 Objections, pp. 4-5 and Table of Additional Objections to Exhibits Following Close of Part 1B
Cases-In-Chief, available at:

28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/petitions/2016dec/20161230_dwr_objection.pdf

1 **II. BACKGROUND**

2 On September 1, 2016, Sacramento submitted its evidence for its case-in-chief during Part
3 1B of this proceeding.² DWR (and San Luis Delta Mendota Water Authority) subsequently
4 objected to portions of written testimony, and Sacramento submitted its responses to that set of
5 objections on October 19, 2016.³

6 On October 27 and October 28, 2016, Sacramento presented its specific case-in-chief for
7 Part 1B through four (4) witnesses and approximately thirty-two (32) exhibits.⁴ The six (6)
8 exhibits now objected to by DWR are among those exhibits for which Sacramento moved for
9 admission into evidence by correspondence dated November 2, 2016.⁵

10 **III. ARGUMENT**

11 This proceeding is governed by Chapter 4.5 of the Administrative Procedure Act;⁶
12 regulations adopted by the State Water Board;⁷ California Evidence Code; and the California
13 Government Code, among other authorities.

14 **A. Sacramento's Exhibits Are Highly Relevant To Sacramento's Claim Of**
15 **Injury As A Legal User Of Water.**

16 Evidence offered during a proceeding for a petition for change as sought in this
17 proceeding is admitted in accordance with Government Code § 11513, which directs pursuant to
18 subsection (c) that relevant evidence be admitted if “it is the sort of evidence on which
19 responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the
20 existence of any common law or statutory rule which might make improper the admission of the
21

22 ² Sacramento's exhibits and submittals are available at:

23 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/sacramento.shtml.

24 ³ Sacramento's October 19, 2016 responses are available at:

25 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/petitions/2016oct/20161019_citysac_response.pdf.

26 ⁴ As distinguished from the collective case-in-chief presented by the Sacramento Valley Water Users (Group 7), of which Sacramento is a member.

27 ⁵ Sacramento's November 2, 2016 correspondence is available at:

28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20161102_citysac_obj.pdf.

⁶ Government Code section 11400 *et. seq.*

⁷ California Code of Regulations, Title 23 sections 648-648.2⁸.

1 evidence over objection in civil actions.”⁸ The California Evidence Code provides additional
2 authority stating that evidence is relevant if it has “any tendency in reason to prove or disprove
3 any disputed fact that is of consequence to the determination of the action.”⁹

4 In this proceeding, the scope and issues set for Part 1 were articulated by the Hearing
5 Team’s October 30, 2015 hearing notice - which was confirmed by the Hearing Team’s October
6 7, 2016 ruling – and include the following issues:

7 “2. Will the proposed changes cause injury to any municipal, industrial or
8 agricultural uses of water, including associated legal users of water?
9 a. Will the proposed changes in points of diversion alter water flows in a
10 manner that causes injury to municipal, industrial, or agricultural uses of
11 water?
12 b. Will the proposed changes in points of diversion alter water quality in a
13 manner that causes injury to municipal, industrial, or agricultural uses of
14 water?”¹⁰

15 Sacramento’s case-in-chief focused precisely on these issues articulated by the Hearing
16 Team. Specifically, the disputed exhibits are relevant as follows:

17 **(1) City Sac Exhibit-17 helps to establish that Sacramento is a legal user of water.**

18 As a participant in Part 1 of this proceeding, Sacramento offers City Sac Exhibit-17
19 (Operating Contract dated June 28, 1957 between Bureau of Reclamation and the City of
20 Sacramento) to establish, at least in part, that Sacramento is a legal user of water. Testifying on
21 behalf of Sacramento, Mr. Peifer stated that he is a Principal Engineer and Policy and Legislation
22 Manager with Sacramento’s Department of Utilities,¹¹ and that Sacramento’s operating contract
23 calls for the Bureau of Reclamation to operate “their facilities to ensure availability for the City’s
24 diversion of water at the City’s facilities on the American and Sacramento Rivers...[and] the
25 water made available under the contract is the City’s own water rights water.”¹²

26 _____
27 ⁸ Government Code section 11513(c).

28 ⁹ Evidence Code section 210. See also, *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.

¹⁰ Hearing Team’s October 7, 2016 Ruling, p. 2 (emphasis added), available at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/docs/20161007_cwf_ruling.pdf.

¹¹ See Exhibit City Sac-1 (Written Testimony of James Peifer), p. 1, paragraph 2.

¹² Testimony of James Peifer, October 27, 2016, pp. 40:22-41:10, available at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/transcripts/20161027_transcript.pdf.

1 Mr. Peifer further explained that:

2 “MBK’s analysis as well as my own independent understanding of the Project
3 increasing export capacity forced us to consider that the future operations could
4 harm the City of Sacramento. It is possible that the reservoirs will be operated to
5 release water to the point that, at times, Reclamation would not be able to release
6 sufficient water to meet Sacramento’s diversion needs.”¹³

7 Further establishing that Sacramento’s operating contract with Petitioner United States
8 Bureau of Reclamation is relevant to Part 1B of this proceeding is the fact that Reclamation also
9 seeks to move into evidence the very same contract marked for identification as DOI-26.¹⁴

10 **(2) City Sac Exhibit-22, City Sac Exhibit-23 and City Sac Exhibit-24 help to**
11 **establish that the proposed changes in points of diversion could alter water flows in a**
12 **manner that causes injury to Sacramento, as a legal municipal user of water.**

13 City Sac Exhibit-22 (Carollo Report entitled Evaluation of Pump Intakes for Drought
14 Conditions, dated January 2016); City Sac Exhibit-23 (CBEC Memorandum entitled Sacramento
15 River Low Flow Modeling at SRWTP Intake, dated February 12, 2016); and City Sac Exhibit-24
16 (CBEC Memorandum entitled American River Low Flow Modeling at EAFWTP Intake, dated
17 February 15, 2016) provide relevant evidence in support of Mr. Peifer’s testimony:

18 “If less water is retained and carried over in upstream reservoirs, reduced
19 reservoir releases also could result in lower water surface elevations at the City’s
20 intakes. This could cause phenomena such as vortexing or cavitation that would
21 damage the City of Sacramento’s intake pumps.”¹⁵

22 **(3) City Sac Exhibit-33 and City Sac Exhibit-34 help to establish that the**
23 **proposed changes in points of diversion might alter water quality in a manner that causes**
24 **injury to Sacramento, as a legal municipal user of water.**

25 City Sac Exhibit-33 (City of Sacramento Comments on BDCP and Draft EIR/EIS, July
26 22, 2014) and City Sac Exhibit-34 (City of Sacramento Comments on California WaterFix and

27 ¹³ *Ibid.* at p. 42:15-22.

28 ¹⁴

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160928_doi_exhibit_entry.pdf.

¹⁵ Testimony of James Peifer, October 27, 2016, pp. 42:23-43:3, available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/transcripts/20161027_transcript.pdf.

1 RDEIR/SDEIS, October 29, 2015) support the testimony offered by Sacramento’s expert witness,
2 Bonny Starr. While DWR’s December 30 Objections states that “challenges to the environmental
3 review process are outside the scope of Part of this proceeding,”¹⁶ DWR misses the purpose for
4 which Ms. Starr testified relative to the content of Exhibits City Sac-33 and -34. Ms. Starr
5 testified in pertinent part that:

6
7 “Based on my understanding of the proposed operation of the California WaterFix
8 project, which is most recently described in the Recirculated Draft EIR
9 Supplemental Draft EIS as Alternative 4A with operational scenarios H3 to H4, it
10 appears it will be likely that there will be an increase in the frequency of lower
11 upstream reservoir storage, especially in the late summer and early fall and, as
12 projected, to result in an increase in downstream source water temperatures and
13 reduced flows in the rivers. The California WaterFix documents do not present
14 any analysis of temperature effects related to the municipal use or an analysis of
15 blue-green algae upstream of the Delta, and yet the information shows that these
16 both have the potential to occur. And if they did, they would cause an impact to the
17 ability to use the water for drinking water supply.”¹⁷

18 With respect to the testimony of Bonny Starr, it also should be noted that under Evidence
19 Code section 801, the opinion testimony of an expert may be based on any matter personally
20 perceived by or known to the expert or any matter “made known” to the expert. An expert is
21 entitled to base his or her opinion upon technical reports and scientific literature, provided such
22 matter is “of a type that reasonably may be relied upon by an expert in forming an opinion upon
23 the subject to which his testimony relates.”¹⁸

24 Ultimately, as set forth in Government code section 11513, the disputed exhibits are
25 clearly “the sort of evidence on which responsible persons are accustomed to rely in the conduct
26 of serious affairs,” for which this proceeding unequivocally involves serious affairs.

27 ¹⁶ DWR’s December 30 Objections p. 4:17-18, available at:

28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/petitions/2016dec/20161230_dwr_objection.pdf.

¹⁷ Testimony of Bonny Starr, October 26, 2016, pp. 138:10-139:1, available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/transcripts/20161026_transcript.pdf.

¹⁸ Evidence Code section 801(b); *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Sacramento Established Sufficient Foundation For Admitting The Exhibits Into Evidence.

Mr. Peifer specifically authenticated each of the six (6) disputed exhibits.¹⁹ DWR does not articulate the factual grounds for its legal objection, which is fatally deficient to the objection. Nor do the DWR December 30 Objections challenge the qualifications or credibility of any of Sacramento’s witnesses - for good reason. All of Sacramento’s witnesses rely upon their training and experience to formulate observations, conclusions, and opinions regarding California WaterFix, which (as Petitioners through evidence presented during Part 1A of this proceeding clearly recognize) lacks an operations plan or proposed permit terms or conditions, but would increase capacity for exporting water from the Sacramento area.

IV. CONCLUSION

For the reasons set forth above, the objections submitted by DWR should be overruled in their entirety. Sacramento hereby reserves its rights for oral argument and otherwise to further establish that DWR’s objections lack merit.

DATED: January 6, 2017

STOEL RIVES LLP



By: _____
KRISTEN T. CASTAÑOS
WESLEY A. MILIBAND
ERIC R. SKANCHY
Attorneys for Protestant
CITY OF SACRAMENTO

¹⁹ Testimony of James Peifer, October 27, 2016, pp. 37:2-14, available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/transcripts/20161027_transcript.pdf. -6-

NOTICE OF AVAILABILITY
and
STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation
(Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**CITY OF SACRAMENTO'S RESPONSE TO CALIFORNIA DEPARTMENT OF
WATER RESOURCES' OBJECTIONS TO EXHIBITS SUBMITTED IN
SUPPORT OF PROTESTANTS' CASE-IN-CHIEF DATED DECEMBER 30, 2016**

This Notice of Availability and Statement of Service was served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated October 6, 2016, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

I certify that the foregoing is true and correct and that this document was executed on January 6, 2017.



Signature: _____
Name: Marilyn Sykes
Title: Legal Assistant
Party/Affiliation: CITY OF SACRAMENTO
Address: 500 Capitol Mall, Suite 1600
Sacramento, CA 95814